

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:)
)
)

Petition to Establish Procedural)
Requirements to Govern Proceedings for)
Forbearance Under Section 10 of the)
Communications Act of 1934, As Amended)
_____)

WC Docket No. 07-267

COMMENTS OF EARTHLINK INC. AND NEW EDGE NETWORKS

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SUMMARY

The Commission's process for handling forbearance petitions desperately needs revision. Section 10's forbearance authority is among the Act's most sweeping, sets limited periods for FCC consideration, and allows forbearance to be granted even if the Commission takes no action. Because of these high stakes, the forbearance process should not be regulatory roulette.

Experience has shown that it is essential that parties seeking forbearance be required to define and articulate their requests clearly, with specific citations of the affected statutes, rules and orders. Interested parties should not be required to guess at the specific statutes, rules and orders subject to a forbearance request, as happens when parties vaguely request relief with undefined terms such as "economic regulation" or "broadband regulation." Moreover, as the recent experience with Verizon shows, when a vaguely worded petition is "deemed granted," no one actually knows the full scope of forbearance.

The Commission should also make clear that petitioners both bear the burden of proving that they meet all of Section 10's requirements and must file all supporting evidence on which they seek to rely up front, with the petition. It serves no purpose to allow petitioners to withhold critical data until reply comments – or even later. These "hide the ball" games are inappropriate and are designed solely to frustrate meaningful public input.

The Commission should also create a better mechanism for state consultation and input into the forbearance process, especially when parties seek forbearance from the 1996 Act's key local competition provisions in Sections 251, 252 and 271. States

administer Section 251 and 252, and were required to be consulted prior to grant of Section 271 applications.

Finally, the FCC should develop a rapid method of adjudicating evidentiary and protective order disputes early in the process. In the Verizon 6 MSA Forbearance proceeding, for example, the Commission never adjudicated whether Verizon had misappropriated and used carrier proprietary information in violation of Section 222(b). Related disputes over access to confidential information also delayed parties' access to Verizon's evidence, and the submission of comments, for months. The Commission should delegate to the Wireline Competition Bureau the authority to resolve these disputes, and should require that they be resolved within 14 days.

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I. INTRODUCTION

EarthLink Inc. ("EarthLink"), and its subsidiary New Edge Networks ("New Edge"), strongly support the Petition for Procedural Rules to Govern the Conduct of Forbearance Proceedings of Covad Communications Group, NuVox Communications, XO Communications LLC, Cavalier Telephone Corp., and McLeodUSA Telecommunications Services, Inc. (the "Petition").¹

EarthLink and New Edge have participated in several of the Federal Communications Commission's ("FCC" or "Commission") forbearance proceedings.²

¹ *Covad, et al. Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267 (filed Sept. 19, 2007).

² *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172 ("Verizon 6 MSA Forbearance Petition"), Opposition of EarthLink, Inc. and New Edge Networks, Inc. (filed Mar. 05, 2007); *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 ("Verizon Broadband Forbearance Petition"), Comments of EarthLink in Opposition to the Petition (filed Feb. 08, 2005); *In the Matter of Petitions*

These proceedings often have a significant and lasting impact on competition in the telecommunications market. But unlike other types of FCC proceedings, they are characterized by a striking lack of procedural requirements and safeguards. The absence of these requirements leaves interested parties unable to adequately analyze and respond to forbearance petitions. And, most importantly, the resulting *ad hoc* process leaves Commission staff, in many cases, unable to render non-arbitrary decisions. The experience of the Verizon 6 MSA Petition is a powerful example of how gamesmanship and inadequate evidence can unnecessarily expend Commission resources and impede its ability to protect the public interest unless proper procedures are in place.³

The negative impact of this *ad hoc* forbearance process is magnified by the “unusual”⁴ nature of Section 10 of the Communications Act of 1934, as amended. Section 10 delegates the authority to “forbear from applying any regulation or any provision of th[e] Act” but does not expressly require the FCC to use its typical, and critical, notice and comment procedures.⁵ Moreover, Section 10 states that forbearance petitions are deemed granted at the end of the statutory deadline – even if the Commission has not yet ruled.⁶

This sweeping authority and often restrictive timeframe makes the manner in which the FCC conducts the forbearance process more important than procedural rules

of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97 (“*Qwest 4 MSA Forbearance Petition*”), Reply Comments of EarthLink, Inc., and New Edge Networks, Inc. (filed Oct. 01, 2007).

³ *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, , Memorandum Opinion and Order, WC Docket No. 06-172 (rel. Dec. 5, 2007) (“*Verizon 6 MSA Forbearance Order*”), appeal pending, *Verizon v. FCC*, No. 08-1012 (D.C. Cir. filed Jan. 14, 2008).

⁴ See Kevin J. Martin, Chairman, FCC, Speech to the 2006 American Bar Association Administrative Law Conference, Washington, D.C. (Oct. 26, 2006).

⁵ 47 U.S.C. § 160.

⁶ *Id.*

for many of the agency's other tasks. Unlike other types of FCC proceedings, in forbearance petitions the petitioner rather than the Commission picks the target regulatory provisions, the timing, and the relief sought. With this power must come the legal burden that a petitioner's pleadings are specific and their evidence is compelling. Additionally, unlike some Commission processes, forbearance petitions must be decided quickly. Interested parties, states, and FCC staff therefore need rapid access to all relevant justifications and underlying information. Late-filed key information frustrates public review and comment.

The bottom line is that the Commission's current lack of forbearance petition procedural requirements too often results in petitioners attempting to "jam" both the Commission and the public, to the detriment of orderly decision making. Specifically, and as discussed in more detail below, EarthLink therefore agrees with the Petition of Covad, *et al.*, and suggests, *inter alia*, that the Commission:

- Specify that forbearance petitioners have both the burden of persuasion and the burden of adducing evidence supporting a *prima facie* case as to each and every element in Section 10;
- Require forbearance petitioners to submit a precise pleading of the relief that they seek, with statutory code and Code of Federal Regulations citations for all statutory and regulatory provisions from which relief is sought, and the geographic area over which forbearance is sought;
- Encourage, and provide a means for, state comment on forbearance petitions, especially petitions affecting the local competition rules;
- Adopt a "complete-as-filed" rule for all forbearance petitions;
- Provide a process and commit to a timeframe in which the Commission adjudicates motions to dismiss; and
- Make clear that forbearance petitioners must make data available to commenters in the same form as given to the Commission, and provide a

rapid means of resolving disputes over access to confidential data submitted with or in support of a petition.⁷

Forbearance petitions have become key drivers of the FCC policy process in many of the Commission's most important areas of authority. EarthLink has directly experienced how the current *ad hoc* process undermines public review and agency decision making. Process rules have real-world impact when the stakes are so high. EarthLink therefore respectfully urges the Commission rapidly to adopt the safeguards outlined in the Petition and discussed herein.

II. THE COMMISSION SHOULD SPECIFY THAT FORBEARANCE PETITIONERS HAVE BOTH THE BURDEN OF PERSUASION AND THE BURDEN OF ADDUCING EVIDENCE SUPPORTING A PRIMA FACIE CASE AS TO EACH AND EVERY ELEMENT IN SECTION 10.

Section 10 places forbearance petitioners in a uniquely powerful position. Unlike in typical Commission proceedings, the petitioners, not the FCC, dictate the target regulatory provisions, the timing of the proceeding, and the relief considered. To receive the tremendous benefits of Section 10, the statute requires petitions to meet specified requirements. According to the statute, the Commission must find that:

1. Enforcement of the rule at issue is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with the petitioner are just and reasonable and are not unjustly or unreasonably discriminatory;⁸
2. Enforcement of the rule at issue is not necessary for the protection of consumers;⁹

⁷ EarthLink and New Edge support the entirety of the Petition of Covad, *et al.*, and only highlight some of the proposals that they support herein.

⁸ *Id.* at § 160(a)(1).

⁹ *Id.* at § 160(a)(2).

3. Forbearance from applying the rule is consistent with the public interest;¹⁰ and
4. Forbearance will enhance competitive market conditions.¹¹

The D.C. Circuit and the Commission have made it clear that forbearance is permissible only when all prongs of the test are satisfied.¹² Moreover, under FCC precedent the burden of proving that a petition meets these statutory requirements must rest on the petitioning party: the FCC holds that forbearance petitioners must demonstrate “with specificity why [they] should receive relief under the applicable substantive standards,”¹³ and that “[t]he standards for granting relief in the forbearance context” are no lower than in the waiver context.¹⁴ Because the FCC places the burden of proof on waiver petitioners¹⁵ this means that it also must place the burden of proof on forbearance petitioners.

The Commission, however, has not explicitly stated that the burden rests with forbearance petitioners. EarthLink and New Edge therefore agree with Covad, *et al.*, that the FCC should now explicitly specify that forbearance petitioners have both the burden of persuasion and the burden of adducing evidence supporting a *prima facie* case, as to each and every element in section 10. This clarification of Commission procedures is

¹⁰ *Id.* at § 160(a)(3).

¹¹ *Id.* at § 160(b).

¹² *Petition For Forbearance From E911 Accuracy Standards Imposed on Tier III Carriers For Locating Wireless Subscribers Under Rule Section 20.18(H)*, Order, 18 FCC Rcd 24648, 24653 (¶ 12) (2003) (“E911 Petition”); see also *Cellular Telecomms. & Internet Ass’n v. FCC*, 330 F.3d 502 (D.C. Cir. 2003).

¹³ *E911 Petition* ¶ 24.

¹⁴ *Id.*

¹⁵ *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

consistent with standard judicial allocations of burdens of proof, where it is well-accepted that the burden of adducing evidence follows the burden of persuasion.¹⁶

III. THE COMMISSION SHOULD REQUIRE A PRECISE PLEADING OF THE RELIEF SOUGHT BY FORBEARANCE PETITIONERS.

The changes sought in recent forbearance petitions affect the core of telecommunications competition in the United States. The tight timeframes dictated by Section 10 and the Commission's recent pleading cycles leave FCC staff and interested parties very little time to analyze such petitions and either file comments or make determinations. Furthermore, the forbearance process often produces enormous filings containing information petitioners claim to be relevant to their requests, although this information too often is unfocused, late-filed, and improperly hidden behind confidentiality requests.

Given the nature of such proceedings, the Commission, states, commenters and reviewing courts should not be left to guess at the scope or impact of a forbearance petition. EarthLink therefore agrees with Covad, *et al.*, that the FCC should require that forbearance petitions specifically state the precise parameters of the relief sought when they are first filed. This should include a requirement that forbearance petitioners specify the precise statutory provisions and rules from which forbearance is sought, with citations to the appropriate United States Code or Code of Federal Regulations sections. Petitioners also should clearly state any limitations or conditions on the forbearance they seek.

¹⁶ Wright & Graham, *Federal Practice and Procedure: Evidence* 2d §5122 (2005) (“[T]he same party who has the burden of persuasion also starts out with the burden of producing evidence[.]”)

Furthermore, petitions should not be permitted to invoke broad general terms, such as “economic regulation” or “broadband services,” without explanation. Such broad generalizations based on undefined terms create ambiguity as to the scope and applicability of forbearance.¹⁷ Such a procedural requirement will not only lead to more precise understandings of the impact of granted petitions, but will also require petitioners to think through the precise relief that they seek and lead them to include records and other supporting materials that are more useful to Commission decision makers. The FCC should also require petitioners to specify the geographic area over which forbearance is sought, if forbearance is sought in a manner where geography is relevant. Without geographic specificity, FCC staff and interested parties are unable to judge whether a petitioner’s arguments and materials support the requested relief, and, if granted, the impact of the petition is difficult to understand.

Requiring precise forbearance pleadings is especially important because of the potential for a “deemed grant,” for which there may be no FCC order explaining the contours of forbearance. In such deemed grant situations where the Commission does not file an order, FCC staff, reviewing courts, interested parties and even the petitioners themselves can only understand the impact of the grant from the initial petition. If the petition is imprecise – lacking basic information such as the targeted statutory provisions and rules and the geography covered, and is based on general and undefined terms – no one will be able to understand the impact of the FCC action (or inaction). This will lead to unnecessary confusion, violations of the Commission’s intent, and inefficiency.¹⁸

¹⁷ See, e.g., *Verizon Broadband Forbearance Petition*.

¹⁸ Lack of specificity compounds the deemed grant issue. When vague petitions are deemed granted, the Commission not only must struggle with the danger of varying levels of relief granted, as seen in the

IV. THE COMMISSION SHOULD ENCOURAGE, AND PROVIDE A MEANS FOR STATE COMMENT ON FORBEARANCE PETITIONS, ESPECIALLY FOR PETITIONS AFFECTING THE LOCAL COMPETITION RULES.

The states are key partners of the Commission in a range of regulatory matters. State commissions have particular expertise and perspective on the impact of regulatory changes within their jurisdictions. These agencies possess the ability to draw upon their own data, sometimes otherwise unavailable or unknown to the FCC, and to analyze forbearance petitioners' data in ways that improve Commission decision making. EarthLink and New Edge therefore agree with Covad, *et al.*, that the FCC should encourage states to comment on forbearance petitions that affect their populations. To do so, the Commission should provide specific means for state comment, with cognizance of how the compressed time lines of the forbearance process can conflict with state commission time lines (given the time needed for states to review petitions, generate responses, and comply with government review protocols).

State participation in the forbearance process is especially important when petitions involve local competition rules. The states are the primary implementing bodies for local competition rules. They conduct mediations and arbitrations under Section 252, enforce interconnection agreements, were consulted on Section 271 applications, and have a better understanding than the FCC as to the competitive circumstances in their local markets. The states' role in the Section 271 process also often included their analysis of ILEC performance related to unbundling and other Section 251 duties. Granting relief on forbearance petitions related to Section 271, 251, and in many other

Verizon Broadband Petition, *see, e.g., Verizon Broadband Forbearance Petition*, WC Docket No. 04-440, Letter from William H. Johnson to Marlene H. Dortch (Nov. 7, 2007), but also has the challenge that the agency and interested parties do not know the accurate scope of the relief granted.

areas, without affording states a meaningful opportunity to participate, would negate their contributions in these regulatory proceedings. As in the Section 271 process, therefore, the states should have a real and specified role in any forbearance petition review where local competition rules are at issue.

Furthermore, states should have access, without the need to hire outside counsel, to both “confidential” and “highly confidential” material that petitioners assert are relevant to a forbearance petition. State regulatory agencies routinely are involved in cost allocation and rate making cases. Handling confidential information, in these contexts and others, is something that they do on a daily basis. As is the case for interested private parties, they must have access to such materials in the forbearance context to have a reasonable opportunity to participate in proceedings that impact their citizens.

V. THE COMMISSION SHOULD ADOPT A “COMPLETE-AS-FILED” RULE FOR FORBEARANCE PETITIONS.

The FCC’s forbearance petition procedures should seek to give Commission staff the information they need, in a timely manner, to make reasoned decisions. Filing requirements should also seek to ensure that interested parties have a full and fair opportunity to present their views to the Commission. Unfortunately, it is becoming widespread practice for forbearance petitioners to withhold key data until late in the forbearance process. Verizon, for example, provided obviously critical wire center data to the FCC only on reply in the 6 MSA proceeding, short-circuiting the public comment process.¹⁹ It is even worse when critical information is not presented until the eve of the

¹⁹ *Verizon 6 MSA Forbearance Order.*

statutory deadline. In the Omaha Petition, for example, critical information on which the FCC relied was not submitted until the date the order was actually adopted.²⁰

EarthLink therefore agrees with Covad, *et al.*, that the Commission should adopt a “complete-as-filed” rule for all forbearance petitions. Last minute substantial modifications subvert the comment process by forcing commenters to spend substantial time and resources addressing issues contained in the initial petition, but are then withdrawn. With the ability to file petitions without information needed by commenters and the FCC, petitioners can game the system by intentionally omitting key data, then forcing the Commission to expend its already insufficient time to coax out the missing information. Commenters are forced to waste resources on their initial comments on issues that petitioners know from the beginning will be withdrawn. A “complete-as-filed” rule would allow FCC staff and commenters to focus limited time and resources on the real issues. If a petitioner must make a truly important change, this should be permitted, but the “complete-as-filed” rule would allow the FCC to consider this as a new petition, with a reset timeframe that allows proper consideration of the new arguments or data.

VI. THE COMMISSION SHOULD PROVIDE A PROCESS AND COMMIT TO A TIMEFRAME IN WHICH IT ADJUDICATES MOTIONS TO DISMISS.

EarthLink agrees with Covad, *et al.*, that the Commission should commit to a timeframe in which it adjudicates motions to dismiss. Without a properly structured motion to dismiss procedure the Commission has in the past been forced to waste weeks and in some cases months working with petitioners to correct incomplete or otherwise

²⁰ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Motion to Modify Protective Order, WC Docket No. 04-223 (filed Oct. 11, 2006).

faulty forbearance pleadings. Because of the tight timeframe this compromises the agency's ability to properly consider petitions.²¹

Furthermore, unless motions to dismiss are ruled on in a timely manner, the mandated tight timeline leaves interested parties in an impossible position when faced with petitions that include improperly relied on or proprietary information. Under current practice, the FCC only rules on motions to dismiss related to such matters at the conclusion of the review process. The recent Verizon 6 MSA petition illustrates this challenge. Numerous parties, including the New Hampshire PSC, moved to dismiss Verizon's petitions because Verizon relied on E911 data that was carrier proprietary information under Section 222(b), which Verizon was not permitted to use except in relation to the service for which the information was provided.²² Those motions should have been addressed at the outset of the proceeding – both to prevent harm from the alleged misuse of carrier proprietary information and to permit Verizon the opportunity to submit alternative information.

Additionally, a motion to dismiss is the only vehicle to enforce critically needed filing procedures, discussed in Section III of these comments, that would require precisely filed petitions. As discussed above, the Commission should require petitions to specifically state the precise parameters of the relief sought when they are first filed, including the precise statutory provisions and rules from which forbearance is sought,

²¹ The problem of incomplete and faulty filings is well recognized in the Federal Rules of Civil Procedure, which provides judges and litigants with several critical tools for dismissing such filings. For example, Rule 56 of the Federal Rules of Civil Procedure provides for Motions for Summary Judgment, FED. R. CIV. P. 56, and Rule 12(b)(6) provides for a Motion to Dismiss for Failure to State a Claim, FED. R. CIV. P. 12(b)(6).

²² *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, New Hampshire Public Utilities Commission Joinder in Competitive Carriers' Motion to Dismiss (Feb. 1, 2007).

any limitations or conditions on the forbearance they seek, and a specific demonstration of how the petition satisfies each of the requirements of Section 10. If a petition fails on any of these requirements, the Commission should have a specified and timely procedure for dismissing the petition. Such dismissal would not have a prejudicial effect on the petitioner's arguments. If the Commission grants a petition to dismiss because a petition fails on a procedural ground, the petitioners would be free to resubmit a new petition that complies with agency rules, with a new timeline.

VII. THE COMMISSION SHOULD MAKE CLEAR THAT DATA MUST BE AVAILABLE TO COMMENTERS IN THE SAME FORM AS GIVEN TO THE COMMISSION, AND MUST PROVIDE A RAPID MEANS OF RESOLVING DISPUTES OVER THE ACCESS TO CONFIDENTIAL DATA SUBMITTED WITH OR IN SUPPORT OF A PETITION.

The ability to use, analyze and work with data is critical to commenters' meaningful opportunity to participate in the Commission's forbearance petition review process. When commenters – even under protective order – cannot get the same electronic copies of critical data as the Commission, their ability to participate is substantially compromised.

EarthLink and New Edge therefore agree with Covad, *et al.*, that the FCC should adopt a process to decide disputes over access to “confidential” or “highly confidential” data quickly. Authority to resolve such disputes should be delegated to the Bureau Chief, with a requirement that the Bureau issue rulings within 14 days. The lack of such a mechanism leads to over-designation of materials as “copying prohibited,” for example, because under current mechanisms there is no reliable means for rapidly resolving disputes over such overdesignations. But by prohibiting copying, a party can limit its

opponents' ability to review and use the information.²³ As another example, the Verizon 6 MSA comment cycle was delayed for several months when Verizon refused to provide commenters with access, under protective order, to the E911 data it used in its FCC submissions.²⁴

²³ See, e.g., *Alaska DigiTel, LLC, AKD Holdings, LLC, and GCI, Inc.*, WT Docket No. 08-10, Letter of Fred B. Campbell, Jr., Chief, Wireless Telecommunications Bureau to Thomas Gutierrez and Carl W. Northrop (Jan. 23, 2008) ("The Protective Order process is carefully designed to provide robust protection to proprietary and confidential information filed with the Commission, including responses to information and Document Requests, while at the same time providing other parties to Commission proceedings with a meaningful opportunity to review and comment on the evidence submitted in the record . . . The overdesignated responsive documents as 'copying prohibited,' which has emerged as a problem recently, frustrates the Commission's goals.").

²⁴ *Verizon 6 MSA Forbearance Order*.

VIII. CONCLUSION

For all of the forgoing reasons, the Commission should promptly adopt the procedural requirements contained in the Petition.

Respectfully submitted,

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